Appellant urges that the First Amendment guarantees to Western the use of all possible means of public communication, free of any restraint or denial based on the competitive impact of the materials transmitted. Appellant also relies on the prohibition against censorship contained in Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326 (1958).

We do not consider that the Commission has violated either the constitutional or the statutory mandate. We do not have Western before us. Whatever the latter's rights generally may be, the appellant—and only the appellant—is seeking a license which the Commission, applying proper principles under the law, has denied. We cannot hold that appellant is entitled to the authorization sought, in derogation of those principles, merely because one of its customers claims to have rights of communication not available to the appellant.

It may be assumed that any denial of a license to transmit radio or television programs keeps off the air, and hence deprives the public of, the material which the applicant desires to communicate. But that does not mean that the Commission must grant every license which is requested. Nor does it mean that the whole statutory system of regulation is invalid. Quite the contrary is true: a denial of a station license, validly made because the standard of "public interest, convenience, or necessity" has not been met, is not a denial of free speech. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943).

The Commission's offer to reconsider appellant's application if it shows that Western will not duplicate the local station's programs, and will make those programs available to Western's subscribers, appears to us to be a legitimate measure of protection for the local station and the public interest. The protection of the public interest does not amount to "censorship" within the meaning of Section

326. See *Bay State Beacon v. Federal Communications Commission*, 84 U.S.App.D.C. 216, 171 F.2d 826 (1948). See also *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 60 App.D.C. 79, 47 F.2d 670 (1931).

> "5. Whether the Commission made adequate findings explaining why the denial of a common carrier authorization under the circumstances of the instant case is a legally valid exercise of regulatory jurisdiction and not censorship of public communications, particularly in view of the Commission's contrary holdings in this regard."

Appellant's argument on this point is that prior to its decision in the instant case, "the Commission consistently has held that it cannot validly deny a common carrier authorization in order to reach a community antenna customer of the carrier and thus prevent an indirect economic impact upon a broadcast station." Appellant says that this policy should not be abandoned "except for the most cogent reasons," citing *WOKO, Inc. v. Federal Communications Commission*, 80 U.S.App.D.C. 333, 341, 153 F.2d 623, 631, reversed on other grounds, 329 U.S. 223 (1946). Assuming that there has been a change of policy on the part of the Commission, we think it supplied convincing and fully adequate reasons for its action in the present case, as appears elsewhere in this opinion, and we cannot say that the decision results in unfair or discriminatory treatment of the appellant.

> "6. Whether the Commission's conclusion that a grant of Appellant's application would result in the demise of a television broadcast station is supported by adequate findings and by substantial evidence."

Appellant's principal contention in this regard is that the record does not show, and the Commission did not adequately find, that the antenna systems (if and when they

received improved service from appellant, under the proposed arrangement) would be "the decisive factor in the predicted demise of the [local] station."

Although matters of this sort are difficult of appraisal, we think the record amply supports the Commission's conclusion that the unconditional grant of appellant's application would probably result in the demise of KWRB-TV. Under existing conditions, that station since its inception in December 1957 has been operating in the "red," but in each succeeding year the gap between its income and operating expenses has decreased, with the real possibility that eventually it will operate in the black. The improving financial outlook is attributable to several factors: the better picture offered by KWRB-TV over that of the CATV system, in instances where the same network programs were carried both by KWRB-TV and one or more of the CATV cable channels; a decrease in the number of subscribers to the CATV cable in part of the area served by KWRB-TV; the fact that KWRB-TV is a family enterprise with low expenses[1] and high productivity; the substitution by KWRB-TV of network programming, for which charges are not made, in place of syndicated film purchases; and primarily its increasing sales of local spot advertising because of its widening network affiliations and the gain in viewers resulting from the decrease in the number of subscribers to the CATV cable.

If appellant's application were granted, the service which could be offered by the Western systems would be improved. Western could offer subscribers a larger choice of distant stations, and its picture would become better.[2] It is probable that new subscribers would be attracted and that many, if not most, of the subscribers would view only

[1] The owners apparently have not yet received salaries or other distributions from the station.

[2] This sentence was changed by the court's order amending its opinion. R. 225.

the stations on the CATV cable. The conclusion is certainly warranted on these facts that the local station would find it increasingly difficult to sell advertising, its best source of income, in the light of this potential shift in listener-viewer reception, and its survival would be seriously jeopardized.

The local station of course has already been licensed, and its overall programming has been found to serve the public interest. It has a good local operating record, and it programs for the community it serves. Its arrangements with the three networks with which it is affiliated permit it to carry their entire programs, but to delete the "commercials" and substitute "public service." It carries public service "spots" on behalf of its own community. The closing of the station would mean that no local programs of this type would be available to residents of at least half of the area served. Furthermore, other serious consequences would follow the closing of the local station. The record shows that it is too costly for the CATV cables to enter rural areas. Out of a total population of 75,960 persons (by the 1960 Advance Census Reports) in the area served by the local station, 43,600 lived in rural areas (including towns of less than 2,500 persons). Forty thousand of these persons would be without any television service at all if the local station went out of business.[8] Moreover, in the six urban areas where the CATV cables operated on a subscription basis, the 24,393 residents would be deprived of free television service if the local station failed, and thereafter would have television coverage available only if they subscribed and paid for it. We think that the Commission justifiably concluded that the continuance of the local station served the public interest, and that it was fully warranted in imposing conditions, designed

[8] In two towns of less than 2,500 persons each, having a combined population of 3,605, the CATV cables provided service to those who subscribed for it.

to protect that station, for the reconsideration of appellant's application.

The Commission's order will be

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,089

CARTER MOUNTAIN TRANSMISSION CORPORATION, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

JOSEPH P. ERNST and MILDRED V. ERNST,
d/b as Chief Washakie TV, *Intervenor*.

On appeal from a Decision and Order of the Federal Communications Commission.

Before: BAZELON, *Chief Judge*, and WILBUR K. MILLER and WASHINGTON, *Circuit Judges*.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision and order of the Federal Communications Commission on appeal in this case is hereby affirmed.

PER CURIAM: WASHINGTON

Dated: May 23, 1963

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. First Amendment to Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. Communications Act of 1934, as Amended, 47 U.S.C. (1958 ed.)

§ 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 201. (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions

of such charges, and to establish and provide facilities and regulations for operating such through routes.

§ 214

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communications established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or

more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

* * * * * *

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such

authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity; or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

§ 307 (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

§ 308 (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it . . . .

§ 309 (as effective at the date of the filing of petitioner's application)

(a) If upon examination of any application provided for in Section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known

parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days . . . In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and deter-

mination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

§ 326. Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

3. Interstate Commerce Act, 49 U.S.C. (1958 ed.)

§ 1.

(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have

been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. . . .

* * * * *

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term

is used in this chapter, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX C

Excerpts from Prior Commission Decision* Which Was Transmitted to, and Acquiesced in, by, Congress

72. With respect to issue No. 12 in the notice of inquiry, it has been urged by most of the broadcasters that the Commission is obligated in making the determinations of "public interest" under sections 307 (a) and 309 (a) of the Communications Act, to consider the impact upon a television broadcaster of the grant of radio facilities to a communication common carrier, where the common carrier facilities will be used for the purpose of providing communication service to a community antenna system operating in competition with the broadcaster. Implicit in this argument is recognition of the fact that it is not the common carrier which competes with the broadcaster or affects him adversely; it is the CATV. To embrace this argument would require the Commission to consider the content of the communications handled by the carrier, and the ultimate use to be made thereof.

73. In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possibly, even ordinary motion picture and legitimate stage operators; magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration.

74. We have heretofore partially answered this argument in our opinion *In re Application of Intermountain Micro-*

* *CATV and TV Repeater Services*, 26 F.C.C. 403, 431-433, 441 (1959), holding contrary to the instant case.

ware, 24 FCC 54, 16 R.R. 732 (January, 1958), which we now affirm. Enlarging upon that decision, we now wish to make this point: the "public interest" considerations which pertain to the grant of a communications common carrier application are not the same as, or interchangable with, those which pertain to the grant of either a Broadcast Service application or a Safety and Special Radio Services application. . . . In the case of a broadcast applicant, . . . despite the existence of broadcast frequency allocations and service rules, a more searching and complete "public interest" determination is made with respect to each individual applicant, including an examination of the "content" of the service proposal. Thus, a broadcast applicant must not only show that he is legally, technically, financially, and otherwise qualified, but he must also show, for example, explicitly how his proposed operations will serve the "public interest," including program plans and, under some circumstances, relationship to other media of mass communications and other matters. In the case of the common carrier applicant, in addition to the showing of legal, technical, financial, and other qualifications, there is, typically, the necessity for showing that there are no other public communication facilities available to do the specific job proposed; that the applicant is ready, able, and willing to serve all members of the public who may desire the service, without discrimination; and that there is now in being one or more members of the public who require the service, or some reasonable expectancy that one or more such persons will present themselves if the facility is authorized. There is no examination of the "content" of the intelligence which is to flow over the communication circuit.

75. We are of the opinion that, in relation to the authorization of a common carrier facility, whether it be for a radio facility under title III of the act or a wire facility under title II, it is neither proper, pertinent, nor necessary for us to consider the specific lawful use which the common

carrier subscriber may make of the facilities of the carrier. To take a different view would place the Commission in the anomalous position of acting as a censor over public communications, and put us under the burden of policing, not only the use of such facilities but the content of communications transmitted on the facilities. The logical extension of such a philosophy would require us to deny communications facilities of any kind (message telephone, telegraph, etc.) to CATV's and, for example, to deny access to facilities to those acting contrary to our concept of the public welfare. The adjudication of these matters is beyond our province.

76. Finally, we wish to emphasize that the rendition of common carrier communication service involves some situations which may be unique in the field of public utility regulation. The broadcasters challenge the propriety of regarding specialized microwave relay facility operations of the nature herein discussed, as being common carrier operations. It is not unusual, in the communications field, to find a carrier providing a regulated particular type of communication service over a particular route for a single customer. The carrier may be one who offers a specialized type of services, as distinguished from one who offers a general service. (*See In the Matter of Allocation of Frequencies, &c., for a Theatre Television Service*, 9 R.R. 1525, 1538-1539.) Also, it must be remembered that many communications common carriers traditionally and regularly provide services which are designated "private line services." Such services may, for instance, comprise single or multiple communications paths to one or many points for a single customer. In a context more closely related to the instant problem, we point to the fact that many broadcasters utilize the services of Bell System Co., or independent telephone companies, where the carriers provide a tailor made, especially constructed microwave facility comprising an off the-air pickup point, and associated relays terminating in the broadcaster's studio. This is a typical broad

caster's private line common carrier facility where there is, in fact, only one user or subscriber involved and where more than one such user on that particular facility is seldom, if ever, contemplated or expected. On the contrary, many common carrier installations affording similar pickup and relay services for CATV systems (as specialized carriers) provide such service to multiple subscribers simultaneously and operate with the continued hope and expectation that new and additional broadcast and CATV subscribers may avail themselves of the use of the facility. In the communications field, these activities have always been treated and regulated as a communications *common carrier* offering. We find no basis to warrant a change in this regard at this time.

77. For these reasons, we conclude that issue No. 12 in this proceeding must be answered by a determination that it would not constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization for common carrier microwave, wire, or cable transmission of television programs to CATV systems on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations.

* * * * * *

99. . . . Two of the broadcasters' suggestions, both relating to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. Since both of these steps require changes in the Communications Act, we will shortly recommend to Congress appropriate legislation, as indicated above. . . .